87-1169
NO.

IN THE SUPREME COURT OF THE UNITED STATES

1987 - 1988 TERM

RUSSELL BEAN
Defendant/Petitioner

V.

UNITED STATES OF AMERICA
Plaintiff/Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT
FROM THE SIXTH CIRCUIT COURT OF APPEALS
No. 86-6082

PETITION FOR WRIT OF CERTIORARI

RUSSELL BEAN
Defendant/Petitioner
609 Cherry Street
Chattanooga, TN 37402
(615) 267-6607

35 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Is the temporary taking of a tape recorder from an undercover person for the Government, yet that person being unknown as an agent to the defendant, theft of Government property as described in 18 U.S.C. 641.

II.

Did the Government's agents conduct constitute prosecutorial misconduct that would bar any conviction upon the basis of a bad faith prosecution.

III.

Can the defendant be acquitted by a jury based upon that jury's finding of entrapment and prosecutorial misconduct on the part of the Government in a situation and then be convicted of a charge clearly derived out of the same entrapment situation.

IV.

Why can a defendant not testify that he is innocent and raise the defense of entrapment.

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OPINION BELOW

The opinion of the Court of Appeals below, (Appendix, infra, p. A-4 - A-5) was not reported. The opinion of the District Court below (Appendix, infra, p. A-1 - A-2) was not reported. Notice of Appeal was filed (A-3).

JURISDICTION

The judgment of the Court of Appeals below (Appendix, infra, p. A-4 - A-5) was entered on October 8, 1987. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

1. The Fifth Amendment to the United States Constitution which provides, in pertinent part, as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime...be deprived of life, liberty, or property, or without due process of law."

2. The Fourth Amendment of the Constitution.

3. The statutes under which defendant petitioner was prosecuted, although noting herein turns upon their terms, were 18 U.S.C. Section 641, the pertinent provisions of which are as follows:

> §641. **Public money, property or records**
>
> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted - Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

STATEMENT OF THE CASE

The defendant appellant, RUSSELL BEAN, was an attorney in Chattanooga, Tennessee, and had practiced law for seventeen (17) years (Trans. 1189). He had built up a good reputation (Trans. 1165, 1173, 1179, 1480). Mike Morgan, a young attorney, became associated in the law firm with the appellant. Mike Morgan had a live-in girlfriend, Janet (Abney) Morgan, who later became Morgan's wife (Trans. 296). It was through the Morgans that the defendant BEAN first became involved with cocaine (Trans. 1193, 1205-1206).

Years later the defendant became involved in a fuss with two federal agents over a local City Court controversy. The agents were Nix and Curtis (Trans. 1271-1274, 1785-1789). Because of this controversy the agents were reprimanded by the local Attorney General's Office and their supervisor. (Trans. 1276, 1797-1819). The agents got mad at the defendant and vowed to get even (Trans. 1276-1278).

The defense contends that the agents obtained illegal information with which to prosecute him by the illegal entry of his law office (Trans. 1279, 1820-1822; 887, 1281, 1284-1286).

The appellant contends that Nix and Curtis needed more proof to indict the appellant for using cocaine so they conspired with Janet Morgan to set up meetings with the appellant with Janet Morgan having a secret tape recorder with her and to record the appellant's testimony of his past experiences years before. In return, the agents would help Mike Morgan get his fifteen (15) year jail sentence reduced (Trans. 360, 362; 1624-1625). The agents also agreed not to prosecute Janet Morgan for possession and distribution of cocaine and marijuana (Trans. 703; 314). The agents further agreed to make money payments to Janet Morgan in return for her cooperation to entrap the appellant (Trans. 665, 670-673; 929; 1316, 1320).

Janet Morgan did in fact set these meetings up. On October 17, 1985, the appellant discovered that he was being recorded (Trans. 1299-1300). The tape recorded was still running (Trans. 1302-1303). At this time Janet Morgan revealed that she did this because they had threatened to involve her (Trans. 1304; (P.T.C. 139)).

Bean took the tape, telling Morgan to wait there, he was going to listen to it and call her back (Trans. 1305).

The defendant was then indicted on six (6) counts consisting of bribery, distribution of cocaine, and theft of Government Property. The defendant was found not guilty of all counts, except Count Six which was theft of Government Property, pursuant to 18 U.S.C. 641.

ARGUMENT

QUESTION I.

The conviction of Count Six of the Indictment is based upon 18 U.S.C. 641. Congress intended for the elements of theft to be proven beyond a reasonable doubt before a conviction could stand. that essential element is that one must intentionally and knowingly convert the property in question.

Courts have consistently adhered to these principles and the law of requiring intent. Marissette v. United States (1952) 342 U.S. 246; 96 L.Ed. 288; 72 S.Ct. 240, United States v. Saunders (1952 U.S.) 6 CMR 614.

It has long been held that an honest mistake of the facts constituted a defense because criminal intent to steal or knowingly convert is an essential element of the offense of willfully and knowingly stealing and converting property of the United States. U.S. v. McComis (1952 U.S.)

In the case at bar, the appellant contends that the facts of this case just do

not constitute a theft or a criminal conversion with the necessary intent. All through the facts of this case it was evident that it was an espionage type case (Trans. 1272, 1279, 1282; 872-875, 812). The proof showed that the appellant was trying to discover if it was the Government's agents who broke into his law office (Trans. 1282, 1286-1287). On the other hand, the agents believed the appellant was taping them (Trans. 866, 1276).

The agents were countering with methods in an attempt to get back at the appellant for his revealing their scheme in the Chattanooga City Court and giving them a bad record (Trans. 1281-1282; 1285; 867, 875, 886-889, 892-894).

The appellant uncovered the recorded with the mistaken belief that it was Janet Morgan's.

Such a mistake does not formulate the necessary criminal intent or knowledge to convert. U.S. v. McComis, supra.

Appellant avers that the mere taking of the recorder was not enough to establish the

crime. U.S. v. Kemble, 197 Fed. Rep. 2nd 316 and U.S. v. Trinder, 1 F. Supp. 659.

In the Trinder case, supra, some Indians who were wards of the Government took an automobile of the Government's. While they had the vehicle they wrecked. The defense in the Trinder case, supra, was that the defendants were only taking the car for temporary local use with the intent to return it to the place or the vicinity of where it was taken where it would probably be recovered by the owner. The Trinder case, supra, held that the defendants were not guilty of stealing the automobile as there was not sufficient proof of intent to permanently deprive the owner of the property.

The case at bar is directly in point with the Trinder case. The appellant intended to listen to the tape that was in the tape recorder and then return the recorder (Trans. 1304-1305). He told Janet Abney Morgan to wait there as he might have her and her husband indicted for blackmail (Trans. 1304).

If anything, the Trinder case, supra, would have been a case involving criminal intent to convert more than the case at bar. In Trinder, the defendants did wreck the vehicle and the defendants' entire theory was they were to bring the vehicle back to the same vicinity where they had gotten it. However, the Indians abandoned the car after the wreck and the Government recovered it. In the present case, your appellant handed over the recorder when he learned it's true owner.

QUESTION II.

The appellant averred that Mike Morgan told the appellant RUSSELL BEAN that the subpoena was issued to Janet Morgan to cover up the tape recorded conversation of October 8th (Trans. 587). Agent Curtis denied this but the appellant alleges that his explanation of having the Grand Jury subpoenas issued on Janet Morgan for the purpose of protection was a sham and not for the purpose of securing her attendance at the Grand Jury (Trans. 902-903, 908). Appellant avers that the Trial Court

erred in not granting the appellant's motion for judgment of acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure (Trans. 945-946). There the Court cited a case out of the Criminal Law Reporter which is directly in point on the question of a Sham Subpoena. U.S. v. Caputo, USDC EPa 4/28/86. There the Court held that the Government's conduct in issuing a Sham Subpoena is improper and amounts to prosecutorial misconduct.

PAYMENT OF MONEY TO WITNESS AND/OR INFORMER

Appellant avers the procedures of paying Janet Morgan an amount of One Thousand Thirty-Four and 30/100 ($1,034.30) Dollars is blatant misconduct. The Government's attempted explanation of it just demonstrates their efforts to cover up its real purpose. The Government first said the cash money of One Hundred ($100.00) Dollars was paid to Janet Morgan so as to give the appearance she went to see her husband Mike in Florida (Trans. 929-930). When, on cross-examination, it was brought out that many of the payments were after the discovery of the

scheme, they then said it was to protect her. However, when asked the question why was the protection only for the weekends, they offered no explanation (Trans. 930). Cross-examination established that the payments were for Grand Jury testimony (Trans. 671-673), and to pay a phone bill (Trans. 666, 672). Upon cross-examination, Janet Morgan admitted the vouchers she signed and the money was for services rendered, not for protection (Trans. 670-671).

Such a fee arrangement between the Government and an informer whereby the latter agrees to make a case against a party in exchange for compensation to be determined after the trial on a basis of the informer's performance is condemned by a majority of the U.S. Court of Appeals as a violation of due process rights of the accused. U.S. v. Gervantes-Pacheco, 7/7/86.

The Court first condemned contingent informer fee agreements that target a particular person in Williamson v. U.S., 311 F2d 441. In Williamson the Court stated:

> "The inducement such arrangements provide for an informer to "frame" someone or to induce innocent persons to commit crimes that they had no previous intent to commit."

The Court in U.S. v. Cervantes-Pacheco, supra, in analyzing the Williamson case, supra, stated as follows:

> "Williamson prohibits the Government from picking out particular individuals for investigation and paying informants if they can implicate those suspects."

In the Cervantes-Pacheco case, supra, the Court said:

> "The government agents' actions here were clearly barred by Williamson, the majority continues. The defendant was pre-selected by the government agents for the informer's efforts. Moreover, the amount of the informer's fee depended not only upon his undercover operations but also upon the quality of his subsequent testimony. This arrangement directly tainted the fact finding process itself. Such an arrangement provided too great an incentive to give damaging testimony and therefore exclusion of the testimony was required."

The Cervantes-Pacheco case analyzed a theory that should be applied to the case at

bar as these facts would be directly in point. The Court there said:

> "The time has come to announce boldly and firmly that our judicial search for the truth cannot be reconciled with the virtual purchase of perjury."

Your appellant defendant avers that the plan or scheme itself was conduct by the agents and the Morgans not to enforce a crime but to create one.

QUESTION III.

The defendant appellant was found not guilty of the first Five Counts because of entrapment (Tech.R. Motion For New Trial, Juror's Affidavits). The appellant says such a verdict is totally inconsistent in that both Counts 1 and 2 arose out of the entrapment situation. That the tape recorder itself was a device of the entrapment. That without the illegal activities of the entrapment there would not have even been a recorder nor would the appellant have discovered the taping of appellant and that the prosecuting Government cannot benefit from it's own illegal activities.

To allow the guilty verdict to stand would be to approve of illegal activities by means of entrapment. It would be to go against the Supreme Court Rulings that deplore entrapment.

Appellant avers that this is a case of first impression on inconsistent verdicts of entrapment.

With these factors in mind, the defense refers the Court to the case of United States v. Waterman, 732 F.2d 1527 (8th Cir., 1984).

There the defendant, Waterman, was convicted of mail fraud. After the trial, he discovered evidence of an agreement between the Government and its chief witness whereby the witness was offered favorable treatment contingent upon the success of the prosecution. Waterman filed a motion to vacate, set aside or correct the sentence claiming that the agreement between the Government and the star prosecution witness against him irreparably tainted that witness' testimony depriving Waterman of the Fundamental Fairness protected

by the United States Constitution. In a stern opinion the Waterman Court held:

> "We hold that the Government's agreement with its key witness hampered the truth-finding function of the jury to a degree which cannot be reconciled with the fair procedures guaranteed by the due process clause of the Fifth Amendment."

The 8th Circuit in the Waterman case further stated:

> "This case involves not the undisclosed possibility of bias, but the disclosed encouragement and reward of bias.
> We see no place in due process law for positioning the jury to weed out the seeds of untruth planted by the Government. Certainly the witness, Gaunst, might have lied regardless of the contingency agreement and the jury was generally commissioned to determine the truth of his testimony; but that is no reason for the Government to give him further incentive to selectively remember past events in a manner favorable to the indictment or conviction of others."

Your defense would show that the case at bar is much stronger in its Government misconduct violations than the Waterman case in that the case at bar had paid witness informant and illegal activities of thefts and break ins by the Government and the hiding of a witness.

The Waterman case did however elude to these propositions and stated:

> "We are not faced with the situation of a paid informant who might be more likely to entrap a defendant because of the contingent nature of her or his compensation. See United States v. Civells, 666 F.2d 1122, 1129 (8th Cir. 1981). Nor do the facts before us resemble Government participation in illegal activity with a defendant prior to trial through undercover agents or paid informants which, although not technically entrapment, is so outrageous as to deny the defendant due process of law." See United States v. McCaghren, 66 F.2d 1227 (8th Cir. 1981). (Emphasis added)

In McCaghren, supra, the Court recognized that apart from the entrapment requirements placed upon a defendant, the governmental participation may be so outrageous or fundamentally unfair as to deprive the defendant of due process of law or to move the courts in the exercise of their supervisory jurisdiction over the administration of criminal justice to hold that the defendant was entrapped as a matter of law. The McCaghen court said:

> "A claim of entrapment on the basis of outrageous Government involvement does not present any question for the jury to decide but solely a question of law for the court."

The Supreme Court case of United States v. Twigg, 588 F.2d 373 (3rd Cir. 1978) went even further on this principle of prosecutional misconduct. The Twigg case in reversing the defendant's conviction specifically stated that their reversal was not based upon entrapment. The defendant Twigg did not raise the issue of entrapment on appeal because the defense was not available to him. He was brought into the criminal enterprise by a man named Neville who was not a government agent. However, the Twigg Court found that the police involvement in the case was so overreaching as to bar prosecution of the defendant as a matter of due process of law.

The Twigg Court, supra, in reaching its decision cited the prior cases of Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed 113 (1976), and United States v. Russell,

459 F.2d 671 (9th Cir. 1972, and 411 U.S. 423 (1973).

The Hampton and Russell Courts had stated that some day they may be presented with a situation in which the conduct of law enforcement agents was so outrageous that due process principles would absolutely bar the government from invoking the judicial processes to obtain a conviction.

The Twigg Court, supra, stated that time had come. Your defense says in the case at bar that that time has come again. Your defense respectfully says that no judicial process can allow or overlook the conduct in this case of these witnesses.

The Twigg Court, supra, further cited the cases of United States v. West, 511 F.2d 1083 (3rd Cir. 1975) and United States v. Borum, 584 F.2d 424, both of which substantiated the Twigg Court principle. The Twigg Court cited one portion of the West decision that is appropriate to the charge in the case at bar of

the theft of federal property, to wit: the tape recorder:

> "The role of the government has passed the point of toleration. Moreover, such conduct does not facilitate discovery or suppression of ongoing illicit traffic in drugs. It serves no justifying social objective. Rather, it puts the law enforcement authorities in the position of creating a new crime for the sake of bringing charges against a person they had persuaded to participate in a wrongdoing." (emphasis added)

QUESTION IV.

In the Federal Sixth Circuit a defendant cannot raise the issue of entrapment when he says he is not guilty of the charge. United States v. Mitchell, 514 F.2d 758.

In the case at bar the defendant raised the issue of Entrapment on the first five counts of a six count indictment. He was found not guilty by the jury by reason of entrapment (Tech.R. Motion For New Trial, Juror's Affidavits). He could not raise the issue of entrapment on Count Six because he professed his innocence.

The defense says that such a rule as is found in the Mitchell case, supra, violates the defendant's 5th Amendment Rights. The fact that the defendant is not guilty of an offense should not prevent him from having a defense he would otherwise have if he were guilty.

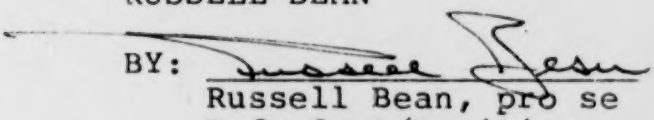
The defense also says it is unfair to allow some circuits to have a rule that allows anyone to assert the entrapment defense while others cannot. The defense is aware that this Honorable Court is about to hear the issue of entrapment, Yates v. Aiken, 290 Sup. Ct. 232, however, the defense says that the present case is a case of first impression to the United States Supreme Court. He asks that the law be made uniform where the defendant has more than one count and needs to plead differently to each count.

CONCLUSION

The defendant asks that because of entrapment, prosecutorial misconduct, and misapplication of 18 U.S.C. 641 that the charge be dismissed.

Respectfully submitted,

RUSSELL BEAN

BY: 

Russell Bean, pro se
Defendant/Petitioner
609 Cherry Street
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(615) 267-6607

IN THE SUPREME COURT OF THE UNITED STATES

1987 - 1988 TERM

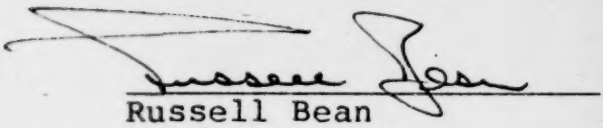
RUSSELL BEAN Defendant/Petitioner	*	
VS.	*	No.
UNITED STATES OF AMERICA Plaintiff/Respondent	*	

AFFIDAVIT OF TIMELY MAILING

I, Russell Bean, make oath that the Petition for Writ of Certiorari in the above-styled cause was deposited in a United States post office, with first-class postage prepaid, and was properly addressed to the Clerk of this Court, within the time allowed for filing, and to my knowledge, the mailing took place on the 29th day of December, 1987, within the permitted time.

I further certify that I have served the Solicitor General of the United States with three (3) copies of this petition.

This 29th day of December, 1987.



Russell Bean

Sworn to and subscribed before me

this 29th day of December, 1987.

Vicki S. Donnell

Notary Public

My Commission Expires:

December 22, 1990

APPENDIX

FILED
SEPTEMBER 29, 1986
Karl D. Saulpaw, Jr., Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

UNITED STATES OF AMERICA *

V. * Cr. 1-86-24

RUSSELL BEAN *

O R D E R

It is hereby ORDERED that defendant's request (Doc. 107) to poll the jury be, and the same hereby is, DENIED AS MOOT, the Court having already polled the jury sua sponte immediately after reading the verdict form regarding Count 6 of the Indictment on August 1, 1986. Rule 31(d), Fed.R.Crim.P.

It is further ORDERED that defendant's motion (Doc. 108) for judgment of acquittal notwithstanding the verdict, or, in the alternative, for new trial be, and the same hereby is, DENIED, the Court having reviewed each and every ground set forth in defendant's motion and having found no grounds therein for the granting of the same. Rule 33, Fed.R.Crim.P.

It is finally ORDERED that defendant's motion (Doc. 111) to interview jurors post-verdict be, and the same hereby is, GRANTED IN PART whereby the defense shall be ALLOWED to interview jurors in this matter who initiate the contact between the juror and defense counsel, and DENIED IN PART whereby the defendant or his counsel is strictly PROHIBITED from initiating any contact between them and the jurors in this matter and defense counsel is further PROHIBITED from interviewing any jurors, whether or not they initiate the conversation, if defense counsel has any matters pending in this Court which could be tried before these particular jurors.

ENTER:

S/B: James H. Jarvis
UNITED STATES
DISTRICT JUDGE

FILED
September 29, 1986
Karl D. Saulpaw, Jr., Clerk

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE

SOUTHERN DIVISION

UNITED STATES OF AMERICA

V. CR-1-86-24

RUSSELL BEAN JAMES JARVIS
District Court
Judge

NOTICE OF APPEAL

Notice is hereby given that Russell Bean appeals to the United States Court of Appeals for the Sixth Circuit from the Judgment entered in this action on September 23, 1986.

Russell Bean
Counsel for Appellant
609 Cherry Street
Chattanooga, TN 37402
(615) 756-0066

Date: September 25, 1986

FILED
October 8, 1987
John P. Hehmann, Clerk

No. 86-6082

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
V.	)	ON APPEAL FROM THE UNITED STATES
RUSSELL BEAN, Defendant-Appellant	)	DISTRICT COURT FOR THE EASTERN DISTRIC OF TENNESSEE

BEFORE: ENGEL and RYAN, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

Per Curiam. Defendant Russell Bean appeals his conviction after a jury trial on one count of stealing property of the United States with a value in excess of $100, in violation of 18 U.S.C. § 641 (1982). Bean was acquitted on five other counts, including bribery, obstruction of justice, and distribution of cocaine to persons under the age of twenty-one.

Bean presents many assignments of error for our review, asserting errors in evidentiary rulings, errors in the jury instructions, selective prosecution, entrapment and other government misconduct, inconsistent verdicts, as well as insufficient evidence to support the jury's verdict. We have carefully considered each of the grounds presented and find no reversible error. Furthermore, viewing the evidence before the jury in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1940), we conclude that the jury could rationally conclude that Bean was guilty beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. Gibson, 675 F.2d 825, 829 (6th Cir.), cert. denied, 459 U.S. 972 (1982).

Accordingly, we AFFIRM.